IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

THE CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY,
Plaintiff in Error.
vs.
PATRICK McGUIRE, M. M. HATHAWAY and PHILLIP DELLINGER, Sheriff of Pulaski County, Indiana,
Defendants in Error.
No. 69.

In Error to the Appellate Court of the State of Indiana.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is an action to quiet title, instituted in the Pulaski Circuit Court of Indiana, by the Chicago, Indianapolis & Louisville Railway Company, as plaintiff, against Patrick McGuire, M. M. Hathaway and Phillip Dellinger, as defendants, to quiet its title to a tract of land situated in the Town of Francesville, in said county and state.

The plaintiff's complaint was an ordinary complaint to quiet title according to the Indiana practice (p. 7). There was a second paragraph of complaint specially reciting the title of the plaintiff in error (pp. 7 to 12). On motion of defendants in error, the court ruled that the

second paragraph of the complaint should be made more specific. The plaintiff in error excepted to this ruling of the court and stood upon it, declining to make the amendment. Because of this, said paragraph was no longer a part of the issues in the case (pp. 13, 14 and 15).

The case was submitted to the court for trial without the intervention of a jury, and the court made a special finding of the facts. The court also concluded as a matter of law, that the plaintiff in error was entitled to have its title to said tract quieted (pp. 15 to 24).

Afterwards, as they were permitted to do by the statute then in force, the defendants in error filed an application for a new trial as a matter of right. This application was granted, and the judgment entered in favor of the plaintiff in error set aside (pp. 24 and 25). At this point, upon the application of the plaintiff in error, the venue of the cause was changed from Pulaski to White County, Indiana (pp. 26 and 27).

The answers to the amended complaint as before filed were withdrawn, and the defendants in error filed an answer admitting the title of the plaintiff in error to a part of the tract in controversy and denying its title to the balance thereof (p. 30). Upon this issue the cause was submitted to a jury for trial (p. 31). At the close of the testimony the court directed the jury to find in favor of the defendants in error. Whereupon, the jury returned a verdict in their favor (p. 32).

The Motion for a New Trial.

The plaintiff in error filed its motion for a new trial of said cause, assigning thirteen reasons why the verdict should be set aside. In its motion there are the following causes assigned for a new trial:

1. The court erred in directing the jury to find for the defendant.

2, 3. Error in requiring the second paragraph of amended complaint to be made more specific.

4, 5, 6. The verdict of the jury is contrary to law and not supported by sufficient evidence.

7. Error in refusing to permit the plaintiff to read in evidence the town plat of the Town of Francesville, executed by Allison in 1862.

8. Error in permitting defendants to read in evidence the return of the sheriff on the execution issued on the judgment of the defendant McGuire.

9. Error in admitting the sheriff's deed issued on a sale by virtue of said judgment, executed by the sheriff of Pulaski County.

11, 12. Error in permitting the defendants to prove that this property had not been used for railway purposes.

13. Error in refusing testimony of witness Petre, as to the amount and payment of taxes in Francesville from 1891 to 1898, as the same was shown on the tax duplicate of the town (p. 33).

This motion was overruled and the plaintiff in error excepted to such ruling. Whereupon the court entered judgment in favor of the defendants in error; granted the prayer for appeal of plaintiff in error, and fixed the amount of the appeal bond and approved the surety (pp. 34 and 35).

THE EVIDENCE. TITLE OF PLAINTIFF IN ERROR.

In 1872, and before that time, there existed in Indiana a railroad corporation known as the Louisville, New Albany & Chicago Railroad Company. In that year, by a decree entered in the Circuit Court of the United States, all of the property of that corporation was ordered to be sold to pay and satisfy a mortgage theretofore executed by it (pp. 40 to 43). The sale was made as directed by this decree, and the special master executed a deed to the purchasers at such sale. This deed was approved by the court ordering the sale (pp. 44 to 46). To take over the property thus sold, the Louisville, New Albany & Chicago Railway Company was incorporated and organized (pp. 47 to 50). Afterward this company was consolidated with the Chicago & Indianapolis Air Line Railway Company, and by the terms of the consolidation, the new company took the name of the former one (pp. 50 to 56).

On the first day of January, 1886, the Louisville, New Albany & Chicago Railway Company executed a mortgage to the Farmers Loan & Trust Company, as trustee, covering its railway system, also all property thereafter acquired for its purposes, and all property then owned of every nature (pp. 56 to 69).

On the first day of May, 1890, said company executed a mortgage to the Central Trust Company, as trustee (pp. 71 to 94).

In the granting, or beginning clause of the description of this mortgage it provided that it should cover "all the present and in the future to be acquired railway system and property, of the said party of the first part, of every kind and nature, and however owned, held, leased or enjoyed, to-

gether with all equipment, appurtenances and franchises, now owned, or at any time hereafter acquired by it, being more particularly described as follows" (pp. 76 and 77).

After this there follows an attempted description of all of the property intended to be mortgaged. In this attempted specific description there is the provision as to after acquired property considered by the Indiana court.

In concluding the description, and for the purpose of making clear any obscurity which might arise on account of the words employed in the particular description, the mortgage provides:

> "It being intended and hereby expressly covenanted, that the lien of this indenture shall embrace and bind *all* railroads, *real and personal property*, chosen in action, contract rights and franchises which the *said railway company now owns, or at any time hereafter may own, as fully and to the same extent as if all such property were now in existence and owned by the said railway company, and were specifically described herein* and conveyed hereby." (Rec., 78.)

On the 1st day of September, 1894, this company executed a third mortgage to the Central Trust Company of New York (pp. 94 to 113).

The description of the property covered thereby is more comprehensive in the mortgage of 1890 than it is in either the mortgage of 1886 or 1894, the descriptions in the mortgages last mentioned as to future acquired property covering not only property acquired for railway purposes, but covering all property of every description owned by the corporation at the date of the mortgage. The mortgage of 1890 covers all property of every nature, whether owned at the date of the mortgage or not. If the claim of plaintiff in error cannot be sustained un-

der the provisions of the mortgage of 1890, it cannot be under the others, and it is for this reason that we have quoted liberally from the mortgage of 1890, and have not quoted from the others.

On the 23d day of January, 1897, the Farmers Loan & Trust Company filed a bill of complaint in the Circuit Court of the United States for the District of Indiana, to foreclose the said mortgage executed to it in 1886. At the same time by cross-bills the Central Trust Company of New York filed its complaint to foreclose the said mortgages executed to it in 1890 and 1894, said bills being filed in the said cause above mentioned. A decree of foreclosure was entered in said cause foreclosing each of the said mortgages, and ordering to be sold all the property covered or intended to be covered thereby (pp. 116 to 133).

It appears from the decree that before the date thereof, a receiver had been appointed to take charge of all property of the said mortgagor corporation. In describing the property which the special master was directed to sell on account of such decree, the court in its decree, after embodying the descriptions as they are in the mortgages, provides:

> "That by said sale all equity of redemption of the defendants, and of any and all persons claiming by, through or under them * * * in and to said mortgaged premises, property, rights and franchises, and every part and parcel thereof embraced or included, or intended to be embraced or included in said mortgage be foreclosed, and cut off and forever barred."

The same order was made as to each mortgage foreclosed. (P. 127.)

At such sale the property was struck off to Fredrick

P. Olcott, Henry W. Poor and Henry C. Rouse (pp. 134 and 135). The sale was approved by the United States Court, and the special master executed a deed conveying the said property to the said parties (pp. 139 to 143).

The deed executed by the said special master, and thus approved by the court in said cause, after describing the railway system and property as being conveyed, provided that it includes and conveys the following, to wit:

> "All the railway system and property of every kind and nature formerly of the Louisville, New Albany & Chicago Railway Company." (P. 141.)
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> * * * * *
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> "Also all estate, right, title and interest of said railroad or railway companies and each of them in and to any and all real estate; and all leasehold lands, with buildings thereon erected; and all and all manner of franchises of said railroad and railway companies of every kind and description, however derived and wheresoever situate, and all and all manner of real estate, or interest in real estate, wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or description the same may be, which at the time of the entry of the decrees aforesaid was owned or possessed by said railway and railroad companies and each of them, whether within or without the State of Indiana." (P. 142.)

The said Olcott, Poor and Rouse, by their deed of date March 31, 1897, conveyed the said property which they received by virtue of the deed of the said special master to the plaintiff in error in this case (pp. 144 to 148). The plaintiff in error, as it appears from the record copy of its articles of association, is a railway corporation organized under the laws of the State of Indiana, in the year 1897 (pp. 150 to 155).

On the 20th day of February, 1896, one James C. Brooks, stated to be the only surviving heir of James C.

Brooks, deceased, together with his wife, made a deed of quit claim for the property in controversy in this action, to the Louisville, New Albany & Chicago Railway Company as grantee. Said deed, after describing the property, recites:

> "Said piece or parcel of land being the same platted and dedicated for depot grounds, and duly recorded April 8, 1862" (pp. 155 and 156).

The plaintiff in error proved by the deposition of the treasurer of Pulaski County, Indiana, that the property in controversy had been regularly scheduled by the mortgagor company as a part of its railroad property for taxation, in 1889 and all subsequent years up to and including the year 1897.

In the schedule filed by the said corporation, the said property was described as follows:

> "Schedule B. Railroad track. Belonging to or controlled by the Louisville, New Albany & Chicago Railway Company in Pulaski County, Indiana, April 1, 1896. Township, city and town. Salem Township. Francesville, part section. Sections 4 and 9, Township 29, Range 4. Description: Three lots (town), each 360x150, located on west side of Bill street, between Lyman and Yellow streets."

And said property was so described on the tax duplicates of said county during said years (pp. 158 to 164).

The original schedules filed by the said corporation and referred to in the said deposition are found at pages 166 to 169.

Samuel Petrie, a witness on behalf of plaintiff in error, testified that he had lived in Francesville since 1865. There was a depot building on the line of the railway at Francesville in 1865. It had the appearance of having been built ten or twelve years before. This

building was burned in 1878, and a new one constructed. There was also stock pens there when I went there in 1865. I think they had the appearance of having been constructed about ten years.

There are a number of buildings constructed in Francesville facing the depot grounds. The defendants in error admitted that it is all built up along on Bill street facing the west or the depot grounds. The ground in controversy is in front of these buiildngs, lying on the east side of Bill street. There were but few buildings there in 1865, but since then a number have been constructed.

The same conditions exist on the west side of this tract where buildings have been constructed facing it.

There was also introduced in evidence some photographs showing the buildings as they existed on the east and west side of this tract called the "Depot grounds," and facing this tract. The pictures were taken a few days before the trial of the cause (pp. 176 and 179).

Plaintiff in error introduced in evidence a lease for a part of the property in controversy, executed by the mortgagor company to J. H. Pruitt, in 1893 (pp. 241 and 242). Also a lease by the plaintiff in error for a part of the property in controversy to Jacob Myers. This lease was executed July 1, 1897 (p. 244).

The Evidence of Defendants in Error.

The defendants in error introduced in evidence the amended complaint; the answer; the special finding of facts by the court; its judgment in favor of the plaintiff; a writ of execution issued on said judgment to the sheriff of Pulaski County, defendant in error, Phillip Dellinger;

notice of sheriff sale; levy by the sheriff by virtue of said execution; and the sheriffs deed executed on account of a sale by reason of said execution and said levy, all in the case entitled *Patrick McGuire* v. *The Louisville, New Albany & Chicago Railway Company,* in which a judgment was entered against the said railway company in the Circuit Court of White County, Indiana, on the 24th day of September, 1896 (pp. 181 to 225). The sheriff levied October 18, 1897 (p. 196), sold the property November 13, 1897 (p. 200), executed deed on the sale November 22, 1898 (p. 205).

Defendants in error also proved by witness Medary Hathaway that the part of the real estate described in the complaint which had been sold by the sheriff and which is described in the answer of the defendants in error in said cause, and claimed by them by virtue of said sale, was not used by the railway company for railway purposes. This evidence was introduced over the objection of plaintiff in error.

Said witness testified that much of said property was occupied by other parties under lease executed to them by the said mortgagor company. Said witness also identified, and there was introduced in evidence as a part of his evidence, a plat of this district showing the location of lots and lands and description thereof, the same as in the Allison plat, which was offered and rejected (pp. 225 to 241).

The defendants in error offered to prove by E. H. Appelgate that during the twenty years that he had known the property that was sold by the sheriff and claimed by defendants in error, said property had not been used by the railway company. The witness did not testify because of this statement of counsel for the plain-

tiff in error: "Plaintiff objected to the question because it goes back to twenty years, and that is the time that Mr. Hathaway answered with respect to. The plaintiff will not be a witness on the stand on the subject." (p. 241.)

THE ISSUES, CLAIM OF THE PLAINTIFF IN ERROR.

Each of the parties to this litigation claim title to the real estate in controversy through the Louisville, New Albany & Chicago Railway Company.

The plaintiff in error claims that by statute in force in Indiana at the time the several mortgages foreclosed in 1896 were executed, the mortgagor company was authorized to mortgage all of its property whether acquired for railroad purposes or not, and whether it was possessed at the date of the mortgage or acquired after such date.

Plaintiff in error also claims that by reason of certain provisions in the statutes of Indiana, giving authority to railroads to acquire real estate in certain cases, they are authorized to acquire real property without reference to the use to which it is put or for which it is designed. That it may be acquired, although not used or intended to be used for railway purposes.

That as each party to this litigation claims its title through the mortgagor company, neither is in a position to contend that said corporation did not lawfully acquire the said property.

Plaintiff in error claims that the mortgage executed by the mortgagor corporation in 1890, and which was foreclosed by the decree of the United States Circuit Court for Indiana, covered this and any other property owned by the said mortgagor corporation in the State of Indiana, whether it was used for railway purposes or not.

That it covers the property here in controversy, whether it was acquired by said corporation before or after the date of said mortgage.

Plaintiff in error also claims that the decree of the court was broad enough to and it did direct the special master appointed to make sale, to sell all of the real estate of said corporation in Indiana. That the court thereby adjudged that this and all of the other property of the said corporation was covered by said mortgages.

That because of the said special master making sale, executing a deed to the purchasers at such sale, conveying to such purchasers all interest of the said corporation in any real estate wherever situate within or without the State of Indiana; which deed was approved by the court ordering the sale, it appears conclusively that the court adiudged said real estate here in controversy to be covered by the said mortgage, and the title thereto vested in the purchasers at such sale.

The plaintiff in error also claimed that there was error in the proceedings of the Circuit Court in excluding evidence of said property being listed for taxation in the Town of Francesville, of the description by which it was listed, and also of the payment of taxes and special assessments thereon by the mortgagor company from 1891 to and including 1897. That said court also erred in excluding the original plat of the Town of Francesville, executed by one Allison, which the plaintiff in error offered to introduce in evidence. If said plat had been admitted, it would have shown title to the property in controversy by dedication in 1862, and with such showing the said property would have been covered by each of the mortgages foreclosed by the provision covering all property wherever situate owned by the mortgagor at the date of the mortgage.

Because of the exclusion of this evidence, due effect was denied to the decree of the Circuit Court of the United States, if by it it would have been made to appear that the court was correct in adjudging that said property was covered by said mortgages and conveyed by said deed. So, too, due effect was denied to the said decree, by the judgment of the court to the effect that it was not included in said mortgages nor covered by said decree, for the reason that the description was not broad enough to include it.

Plaintiff in error claims that by said decrees and deeds, and the fact that each party hereto claims through the mortgagor company, its title to said property is established, and whatever lien the defendants in error had by virtue of the judgment is subordinated or nullified.

THE ISSUES, CLAIM OF DEFENDANTS IN ERROR.

Defendants in error claim that the descriptions in the mortgages only covered property used for railway purposes. That the decree and deeds were no broader than the descriptions in the mortgage, and therefore that this property did not pass by virtue of the foreclosure sale, but remained as the property of the mortgagor company and subject to his lien and execution.

THE EVIDENCE EXCLUDED.

Title of the Plaintiff in Error.

The plaintiff in error offered in evidence that which was represented to be a certified copy of the original plat of the Town of Francesville, Indiana, upon which the property here in controversy was indicated by the words "Depot grounds." The court refused to admit this

plat in evidence on the objection of defendants in error. The objection of the defendants in error was:

1st. There was nothing to show that the party who executed the plat, where he therein styled himself as proprietor of the unsold lots, ever had any interest in the property or a right to dedicate the same.

2nd. That the plat was void as a dedication because no grantee was named.

3rd. Because there was no sufficient description of the lands claimed to have been dedicated (pp. 38 and 39).

The plaintiff in error offered again after the introduction of its other evidence, to introduce in evidence the plat of the Town of Francesville before excluded. It was offered in connection with the Brooks deed. The occurrence at the time of this offer was thus recorded in the record:

> "Plaintiff reoffered in evidence the plat heretofore offered, marked Exhibit A, with the quit claim deed, made in February, 1896, in connection with it, the deed having already been introduced and read in evidence (marked Exhibit K) and plaintiff offered to introduce it in supplement of that, the deed from Brooks to the company.
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> By the Court: What is the purpose of it, Judge Field?
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> By Judge Field: The purpose is this: that the grantor in that deed, as Judge Winfield says—it is true, and I have no doubt he will prove it as he did on the other trial—that Brooks, deceased, was the owner in fee simple of the property, and that instead of disputing the title, or the easement, he confirmed it by this deed, and the effect of the deed was to date back to the time the plat was filed and give to the true owner whatever title the plat itself would give; if Brooks was the owner, then of course he ratified that entire plat; it is not necessary

for it to be made by the owner to be adopted by the owner.

Defendants objected to the introduction of the plat in evidence, for the reasons given, when the plat was first introduced or offered in evidence." (Pp. 180-181.)

Samuel Petrie, witness: That he had been town treasurer for six terms. The plaintiff in error offered to prove by him that the property here in controversy was entered of record upon his tax duplicates as the property of the said mortgagor company and taxed to it on the duplicates of said town in 1891. That it paid $80.34 taxes thereon at said time. The court refused to permit this evidence to go to the jury. The plaintiff in error offered to prove by this evidence that the property described on the duplicate is what is commonly known there as the "Depot grounds," the property in controversy. This evidence was excluded (p. 171).

The same entry for each year up to and including 1898, was offered in evidence, but excluded. Plaintiff in error also offered to prove that the said mortgagor had paid the taxes shown on said duplicate against said property during each year from 1891 to 1898, inclusive (p. 171).

Plaintiff in error also offered to prove by this witness that the mortgagor company had paid a special assessment of $1,641 levied against this property in 1896. This evidence was excluded (p. 172). And the same ruling was made with reference to a special assessment of $252, paid by said company (p. 173).

The plaintiff in error offered to prove by this witness that the property to which the assessment referred was what is commonly known as the depot grounds (p. 172). All of this offered evidence was excluded.

Assignment of Error.

1st. Plaintiff offered and the court admitted in evidence on behalf of plaintiff, the foreclosure proceedings had in the Circuit Court of the United States and District of Indiana, the decree of foreclosure and sale entered in said proceedings by that court and the deeds made pursuant to said decree, under which plaintiff in error became the owner of the property involved in the above entitled suit. That the trial court and Appellate Court wholly disregarded the force and effect of said foreclosure decree and such evidence made thereunder and pursuant thereto.

2nd. That said state courts wholly failed and refused to give full force and effect to said foreclosure decree so entered by the Circuit Court of the United States as aforesaid, and wholly failed and refused to give any force or effect whatever to the proceedings had under said decree and in the enforcement thereof, in this, that the railroad mortgages foreclosed by said decree in said Circuit Court of the United States, covered and included in its description of the property therein conveyed the real estate here involved, and the decree foreclosing said mortgages so included in this description of the property covered by said mortgages and to be sold in satisfaction thereof, the piece of real estate here involved, notwithstanding which the said state courts wholly failed and refused to give such effect thereto.

3rd. That for the purpose of more fully showing that the real estate here involved was owned by the railroad mortgagor at the time of the execution of the mortgages so foreclosed as aforesaid, plaintiff in error offered in evidence on the trial of this cause in the trial court of said state, a plat of the Town of Francesville,

executed in 1862, by one Allison, which plat had been duly recorded, it appearing that such plat was both executed and recorded long prior to the execution of said foreclosed mortgages; and also offered evidence showing that the mortgagor of said railroad mortgages so foreclosed as aforesaid, had been in possession of and had paid taxes upon said property from the date of the donation of the land here involved to said mortgagor, which donation was made and shown upon said plat from the date of said plat and its recording down to the institution of the foreclosure proceedings aforesaid, in the Circuit Court of the United States for the District of Indiana, said proceedings to foreclose having been instituted in said court on the 12th day of November, 1896, but said evidence was refused, which refusal plaintiff in error here assigns for error.

4th. That through said foreclosure proceedings, decree and sale, so entered and had in and through said Circuit Court of the United States for the District of Indiana, plaintiff in error became the lawful owner of the real estate here involved, and the judgment of the state courts divesting the title of plaintiff in error thereto, constitute a refusal on the part of said state courts to recognize or to give full lawful force and effect to said proceedings, foreclosure decree and conveyances, in and through said Federal Court, contrary to the Constitution and laws of the United States.

POINT I.

THE PLAINTIFF IN ERROR DID SPECIALLY SET UP AND CLAIM TITLE THROUGH THE DECREE OF THE UNITED STATES COURT, AND THE SALE AND OTHER PROCEEDINGS THEREUNDER, AND AS THE TITLE OF THE MORTGAGOR COMPANY WAS ADMITTED BY ALL PARTIES, THE COURT COULD NOT HAVE DECIDED IT WITHOUT DETERMINING WHETHER IT PASSED BY SAID DECREE.

We have already shown that each party claimed title through the mortgagor company. The plaintiff in error, through the decree and sale in the action to foreclose the mortgages, and the defendants in error through the judgment, and execution sale against the mortgagor company. In view of these claims the *sole question* to be decided was whether the title passed by force of the decree or the execution sale, and the court could not decide the case without deciding this question.

It is the settled law in Indiana that parties claiming title through a common grantor admit the source of title, and in an action to quiet title it is only necessary to trace title to the common source.

Taber v. *Railway*, 15 Ind., 459, 465.
McWhorter v. *Heltzell*, 124 Ind., 129, 131.
Wilson v. *Peelle, Admr.*, 78 Ind., 384, 387.
Smith v. *Bryan*, 74 Ind., 515.
Start v. *Clegg*, 83 Ind., 78.

It has been repeatedly held by this court, that if it appears that the state court *must have considered and decided the Federal question*, in order to have rendered the conclusion which it did, it is sufficient to give this court

jurisdiction, although the fact that such a question was presented and decided was not mentioned in the opinion.

In speaking of the duty of the complaining party to "specially set up and claim" the right, which is relied upon to invoke federal jurisdiction, this court, in the case of *Green Bay, etc.*, v. *Pattern Paper Co.*, 172 U. S., 58, 19 Sup. Rep., 97, 100, speaking by Justice SHIRAS, says:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. *It is sufficient if it appears from the record that such rights were especially set up and claimed in the state court in such manner as to bring it to the attention of that court.*"
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> "The true and rational rule, this court said, in *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 143, "is that the court must be able to see clearly, from the whole record, that a certain provision of the constitution or act of congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied. In *Robey* v. *Colehour*, 146 U. S., 159, 13 Sup. Ct., 50, it was said that, 'our jurisdiction being invoked upon the ground that a right or immunity specially set up and claimed under the constitution or authority of the United States has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right to set up was expressly denied, or that such was the necessary effect in law of the judgment.' *'If it appears from the record, by clear and necessary intendment that the federal question must have been directly involved, so that the State Court could not have given judgment without deciding it, that will be sufficient.'*"
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> *Chapman* v. *Goodnow*, 123 U. S., 540.
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> *Powell* v. *Supervisors, etc.*, 150 U. S., 440.

In the late case of *Kennedy Mining Co.* v. *Argonaut Mining Co.*, 189 U. S., 1, 23 Sup. Rep., 501, 503, this court held that a federal question was sufficiently set up

to give jurisdiction, from the simple fact that the plaintiff in error asserted a title through a statute of the United States. The court, on page 503, speaking by Mr. Chief Justice FULLER, saying:

> "Plaintiff in error contended in the courts below that, by force of Secs. 2 and 3 of the Act of Congress of May 10, 1872, title to the ore in question passed to it through its patent to the Silva mine, and did not pass to the Pioneer through its patent, because the end lines of the latter were not parallel to each other."
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> "The defendant in error contended that its title was not acquired under the Act of 1872, but under the Act of July 26, 1866, which did not require parallelism of end lines."
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> "Under these circumstances it is held by a majority of the court that a federal question was so presented that we have jurisdiction."

The cases of *Tullock* v. *Mulvane*, 184 U. S., 497, 22 Sup. Ct. Rep., 373, 375, and *Missouri, etc.*, v. *Elliott*, 184 U. S., 530, 22 Sup. Ct. Rep., 446, 448, strongly support the principle for which we are here contending.

We might multiply authorities along this line, but that is unnecessary. The opinion of the learned judge in Indiana shows that the *sole title asserted by plaintiff in error* was that given by the decree and sale in the United States Court. This was an assertion of a federal right, just as in the case last cited, the assertion of title by force of an act of Congress, was the assertion of such a right.

To specially set up and claim a federal right, it is not necessary to assert in so many words that a federal right or authority is relied on. In fact, such a bare assertion would avail nothing. By this it is meant that it must be presented to the various tribunals in such a way as to properly place the question before them for decision, ac-

cording to the local practice rules. Where, as here, the right or authority relied on is disclosed by the evidence, and a motion for a new trial is necessary, and the only way to present the matter of whether the verdict and judgment is right on the evidence, then that is the only way by which the question could be presented.

If plaintiff had endeavored to present the question in any way than by the assignment in the motion for a new trial, the Appellate Court would have refused to consider it, because it was not properly presented to the trial court for review.

POINT II.

THE RECORD AFFIRMATIVELY SHOWS THAT THE APPELLATE COURT OF INDIANA DID CONSIDER AND DECIDE THE FEDERAL QUESTION HERE INVOLVED.

The learned judge of the Appellate Court, in stating the contentions of each of the parties, among other things says:

> "Both appellant and appellees claim title through the Louisville, New Albany & Chicago Railway Company. Appellant claims title through certain mortgages given by the Louisville, New Albany & Chicago Railway Company, which were foreclosed in the United States Circuit Court for the District of Indiana, and through which foreclosure and other conveyances following it, its title became vested." (P. 250.)

The court then states that appellees claim title through a judgment, execution sale and deed against said mortgagor company. Continuing, the court says:

> "It is contended by appellant that the real estate in controversy is a part of its depot grounds at Francesville, Indiana, and that the foreclosure and sale of the property of the Louisville, New Albany

> & Chicago Railway Company, through which foreclosure and sale appellant obtained whatever title it may have in the disputed premises, carried with it the title to said disputed premises. The judgment of McGuire against the Louisville, New Albany & Chicago Railway Company was obtained after the execution of the foreclosed mortgages through which appellant claims title. The contention of counsel for appellees is that the disputed property was not embraced within the mortgages and foreclosure, and that the same was not covered by the clause inserted in each mortgage intended to cover after acquired property, and, therefore, could not have been embraced within the foreclosure and sale under the proceedings of the United States Court. *An abstract question of law is, therefore, presented as to whether or not the property in dispute passed by the foreclosure and sale.*" (P. 251.)

As there was no dispute whatever in the evidence, and the question was, therefore, an "abstract question of law," the trial judge in the Circuit Court held that this real estate was not conveyed by the decree, and instructed the jury to find for the defendant. The Appellate Court proceeds to consider this action of the trial court, and holds that, upon the evidence, the action of the trial judge in so instructing the jury was proper. The court holds that the undisputed evidence showed that the real estate in controversy was not used by the railway company for railway purposes. Then applying this undisputed fact to the mortgages, and the decrees based thereon, through which plaintiff in error claimed, that learned court held, that the description therein did not include the property here in controversy, and therefore appellant did not have title on account of such proceedings.

Perhaps the most conclusive answer to the contention of counsel is found in the case of *Missouri, etc.*, v. *Elliott*, 184 U. S., 530, 22 Sup. Ct. Rep., 446, 448. In that case

an action was brought in a state court on an injunction bond given in connection with proceedings had in a court of the United States. The question in controversy was the items of expense to the successful litigant in the injunction case, which could be allowed in an action on the bond. It was claimed by plaintiff in error that the state court erroneously allowed counsel fees in an action on the bond. Defendant in error urged that no federal right or question had been specially set up or claimed in the lower courts, and, therefore, denied the jurisdiction of this court. In deciding this question, this court, speaking by Mr. Justice WHITE, says:

> "We are at the outset met by an objection that there is no jurisdiction to review the judgment of the Kansas City Court of Appeals. It is contended on behalf of the defendant in error that the federal question relied upon was not raised below, and, therefore, is not reviewable here.
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> "The general rule undoubtedly is that those federal questions which are required to be specially set up and claimed must be so distinctly asserted below as to place it beyond question that the party bringing the case here from the state court, intended to, and did assert such a federal right in the state court. But it is equally true that although the allegations of federal right made in the state court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a federal nature was brought to the attention of the state court, yet, *if the state court, in deciding the case, has actually considered and determined a federal* question, although arising on ambiguous averments, *then a federal controversy having been actually decided, the right of this court to review obtains.* * * * *All that is essential is that the federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal.* * * * *And, of course, where it is shown by the*

record that the state court considered and decided the federal question, the purpose of the statute is subserved. And so controlling as to the existence of the federal question is the fact that it was actually considered and decided by the state court, that it has been held, although the general rule is that the raising of a federal question in a petition for a rehearing is too late, yet, when the question is thus raised, and it is actually considered and decided by the state court, the right to review exists."

"Now, it plainly appears that the Kansas City Court of Appeals considered that there was presented to it for decision the question whether, in an action brought in a state court on an injunction bond given in a court of the United States, the state court was bound to apply to such a bond the rule prevailing in the courts of equity of the United States, *viz.:* that attorneys' fees are not a proper element of damage. We say this is undoubted, since the opinion of the Kansas City Court of Appeals recites that such was the contention, and the court proceeded to consider and decide it. That this contention involved a claim of immunity under an authority exercised under the United States, reviewable in this court, we have recently decided in *Tullock* v. *Mulvane*, 184 U. S., 497, *ante*, 657. 22 Sup. Ct. Rep., 372."

In the case last referred to the Supreme Court of Kansas held that there was no federal question involved in the appeal; but this court held that there was such a question, that it was actually decided by that court, and on this account this court had jurisdiction.

San Jose Land Co. v. *San Jose Ranch Co.*, 23 Sup. Rep., 487.

It is ordinarily held that the federal question must be set up or raised before a petition for a rehearing in the court of last resort. But in the cases of *Mallett* v. *North Carolina*, 181 U. S., 589, 21 Sup. Ct. Rep., 730, 731, and *Leigh* v. *Green*, 24 Sup. Ct. Rep., 390. this court, speak-

ing by Mr. Justice SHIRAS, held that, as the federal question raised on a petition for a rehearing was then considered and decided, it was sufficient to bring the case before this court for review.

As the Indiana court found in the record, "An abstract question of law, * * * as to whether or not the property in dispute passed by the foreclosure and sale"; and this abstract question of law was the sole one it considered and decided, it is clear that it did pass upon the federal question, that is, the "due effect" of said decree and sale, and this court can, therefore, review this decision to see whether the true and proper scope of the decree was limited or denied.

POINT III.

THE QUESTION OF WHETHER THE PLAINTIFF IN ERROR HAD TITLE TO THE DISPUTED PREMISES TURNED ON THE EFFECT OF THE DECREE OF THE UNITED STATES CIRCUIT COURT; UNDER SUCH CIRCUMSTANCES THIS COURT HAS JURISDICTION TO DETERMINE WHETHER DUE EFFECT WAS DENIED SUCH DECREE BY THE CONCLUSION OF THE STATE COURT THAT IT DID NOT EMBRACE THE PROPERTY HERE IN CONTROVERSY.

In the case of *Dupasseur* v. *Roshereau*, 21 Wallace, 130, the plaintiff in error was claiming title to a piece of real estate through a sale on execution by the United States marshal, to satisfy a judgment entered in the United States Court. The defendant in error was claiming title through a mortgage executed by the judgment defendant, with a decree in a state court of Louisiana, and deed resulting from a foreclosure and sale thereunder.

The Supreme Court of Louisiana held that the title of the defendant in error was good, and that of plaintiff in error was not. In holding that it had jurisdiction to review this proceeding on writ of error to the Supreme Court of Louisiana, this court, on page 134, says:

> "Where a state court refuses *to give effect to a judgment of a court of the United States*, rendered upon the point in dispute, and with jurisdiction of the case and parties, a question is undoubtedly raised, which, under the Act of 1867, may be brought to this court for revision. *The case would be one in which a title or right is claimed under an authority exercised under the United States,* and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction; and hence, it would be within the judicial power of the United States, as defined by the constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by state courts."
>
> * * * * *
>
> "* * * whether the validity or due effect of a judgment of the state court, or that of a judgment of a United States court is disallowed by a state court, the constitution and laws furnish redress by final appeal to this court.
>
> "We cannot hesitate, therefore, as to our jurisdiction to hear the case."

In the case of *Central Natl. Bank* v. *Stevens*, 169 U. S., 432, this court had to consider a case where the Court of Appeals of the State of New York had enjoined the beneficiaries under a decree entered in a court of the United States, from proceeding thereunder. This court held that it had jurisdiction to entertain such appeal, among other things, on page 460, saying:

> "Whether due effect has been given by a state court to a judgment or decree of a court of the

United States is a federal question within the jurisdiction of this court, on a writ of error to the Supreme Court of the state."

In the late case of *Pardee et al.* v. *Aldridge*, 189 U. S., 429, 23 Sup. Rep., 514, this court had to consider the exact question of jurisdiction which this case presents. In that case plaintiffs in error claimed to be the owners of certain real estate through decrees of the Circuit Court of the United States, entered in the foreclosure of certain mortgages executed by the Texas Trunk Railroad Company. The mortgage in that case differed from those in the case at bar in that it limited the lien to "property *used* for and *pertaining to* the operation of said railroad." The description of the property covered by the decree was general, including "all appendages and appurtenances of said railroad, and the property of said railroad company then acquired or which might be thereafter acquired in the State of Texas, used for and pertaining to the operation of said railroad." (See record in that case, page 153.)

The property in controversy was certain acreage property in the City of Dallas, Texas. The plaintiff in error claiming that it came within the limitations of the mortgage, and the decree of the United States Court, which was in the language of the mortgage; the defendant in error claiming that it was not property "used for or pertaining to the operation of said railroad."

In holding that there was jurisdiction, this court, by Mr. Justice HOLMES, on page 515, says:

> "The case is brought here by writ of error on the ground that due effect was denied to decrees of the United States court. (*Dupassuer* v. *Rochereau*, 21 Wall., 130, 22 L. Ed., 588. See *Sweringen* v. *St. Louis*, 185 U. S., 38, 41; 46 L. Ed., 795, 797; 22

Sup. Ct. Rep., 569.) As we are of opinion that the judgment of the Court of Appeals was right, it is less important than otherwise it would be to discuss *the grounds upon which we think that there is jurisdiction,* and we shall proceed at once to the merits of the case."

The case of *Julian* v. *Central Trust Co.*, 24 Sup. Rep., 399, is very much in point. There upon decree of foreclosure in the United States Circuit Court for the Western District of North Carolina the property of the Western North Carolina Railroad Company was sold to the Southern Railway Company. The decree confirming the sale purported to vest in the purchaser all of the title of the mortgagor company. In an action brought in that state in a local court, some two years afterward a judgment was rendered, on account of an accident happening after the Southern Railway Company had taken charge of the operation of the property. The action was against the mortgagor company, and the Southern Railway Company was not a party to it. The mortgagor company was made defendant on account of a statute of that state to the effect that where the property of a railway company was so transferred, the domestic corporation from which it was transferred should continue liable for damages on account of its failure to discharge its duties, until another domestic corporation was organized, had taken over the property, and agreed to perform the duties owing by it.

After judgment the property which the decree had attempted to transfer was levied upon to satisfy these judgments. The local courts, and also the Supreme Court of North Carolina, held that the property was subject to sale to satisfy the judgments. That because of the statutes above referred to the decree was not effective to pass

title to the purchaser, as it was a non-resident corporation. At this point the Court of the United States, in which the decree was entered, and the sale confirmed, was asked by petition in the original case to stay proceedings under the judgments of the state court in which the attempt was being made to sell its property. The United States court held that its decree passed title, and that the state court and local officers should be restrained. On appeal to this court, this order was confirmed, this court, by Mr. Justice DAY, saying:

> "If the sheriff is allowed to sell the very property conveyed by the federal decree, such action has the effect to annul and set it aside, because, in the view of the state court, it was ineffectual to pass title to the purchaser. In such a case we are of the opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the federal court, and to render effectual its decree. * * *
>
> "In such a case, where the federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding Sec. 720, Rev. Stat. (U. S. Comp. Stat. 1901, p. 581), restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. * * *
>
> "* * * The federal court in protecting the purchaser under such circumstances, was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun."

In conclusion the court says:

> "While recognizing the weight which should be given to the decisions of the Supreme Court of a state in construing its own laws, and being disposed to follow them and accept the conclusions reached in construing local statutes in every case of doubt, we are here dealing with a right or title conferred by authority of the decree of a federal court, which may be virtually set aside and held for naught if the prop-

erty awarded can be taken upon execution in suits to which the purchaser is not a party. *It is conceded that the federal right could be set up in the state court from which the execution issued, and, if denied, the ultimate rights of the parties can be determined upon writ of error to this court.*"

This question has been repeatedly before this court, and in each instance it has been held that here was jurisdiction.

Embry v. *Palmer*, 107 U. S., 3.

Crescent Live Stock Co. v. *Butchers Union*, 120 U. S., 141, 146.

National Foundry & Pipe Wks. v. *Oconto Water Co.*, 183 U. S., 216; 22 Sup. Ct. Rep., 111, 118.

Pittsburg, etc., Ry. v. *Long Island, etc., Co.*, 172 U. S., 493, 507; 19 Sup. Rep., 238, 244.

Jacobs v. *Marks*, 182 U. S., 583, 587; 21 Sup. Rep., 865.

POINT IV.

THE FACT THAT THE FEDERAL QUESTION ARISES ON THE EVIDENCE IS NO OBJECTION TO THE JURISDICTION OF THIS COURT; AND THIS IS ESPECIALLY TRUE WHERE, AS HERE, THE JURY WAS PEREMPTORILY INSTRUCTED TO FIND AGAINST THE FEDERAL RIGHT, AND THE QUESTION PRESENTED IS AN ABSTRACT ONE OF LAW.

We are aware of the rule that this court will not consider the evidence for the purpose of determining the proven facts, where there is a conflict; but this rule has no application in such a case as this. In this case the court will look to the evidence for the purpose of determining whether, in point of law, the judgment against the federal right can stand.

If the rule were otherwise, litigants would often be deprived of their rights; for there is no way to prevent a trial judge from instructing a jury to find one way or another, and upon such an instruction the only way to determine whether there was error is by considering the evidence.

The rule governing in such cases has often been announced by this court.

In indicating the different ways in which a federal question could be specially set up in the case of *Tullock* v. *Mulvane*, 184 U. S., 497, 22 Sup. Ct. Rep., 373, 374, this court, speaking by Mr. Justice WHITE, says:

> "It is urged by the defendant in error that these contentions involve no federal question, and that if they do they were not sufficiently set up in the lower courts, and, therefore, this court has no jurisdiction to review them. We dispose at once of the contention that if the propositions involve federal questions they were not duly raised below, by referring to the statement which we have made of the case, whereby it appears that the contentions were raised below, by the pleadings, *by the objections to evidence*, and by the request for instructions, and, indeed, as so raised were expressly considered and directly passed upon by both the trial court and the Supreme Court of the State of Kansas, which latter fact, in and of itself, suffices to present the federal question, even if it had been otherwise ambiguously raised on the record, which is not the case."

This question was considered by this court in the case of *Lehnen* v. *Dickson*, 148 U. S., 71, 13 Sup. Ct. Rep., 481, 482, this court, there speaking by Mr. Justice BREWER, says:

> "It is true, if there be an agreed statement of facts submitted to the trial court, and upon which its judgment is founded, such agreed statement will be taken as the equivalent of a special finding of facts. (*Su-*

pervisors v. *Kennicott*, 103 U. S., 554.) Doubtless, also, cases may arise in which, without a formal special finding of facts there is presented a ruling of the court, *which is distinctly a ruling upon a matter of law*, and in no manner a determination of facts, or of inferences from facts, in which this court ought to, and will, review the ruling."

In the case of *City of St. Louis* v. *Western Union Telegraph Company*, 148 U. S., 92, 13 Sup. Ct. Rep., 485, this court had to consider an action by the City of St. Louis against the Telegraph Company for the amount of a license tax of $5 per pole which that city had by ordinance imposed upon said company. At the close of the evidence the city made a motion that the court enter judgment in its favor for the amount shown to be due. In holding that whether this motion should have been granted or not presented a question for review, the court, speaking by Mr. Justice BREWER, on page 487, saying:

"At the threshold of the case we are met with the objection that there are no special findings of fact, and that, therefore, our inquiry is limited to questions arising upon the pleadings, or upon rulings made by the court during the progress of the trial.
* * *

"It is enough to say that in this case there was, as appears by the bill of exceptions, an application at the close of the trial for a declaration of law, that the plaintiff was entitled to judgment for the sum claimed, which instruction was refused and exception taken; and this, as was held in *Norris* v. *Jackson*, 9 Wallace, 125, presents a question of law for our consideration."

In *Lancaster* v. *Collins*, 115 U. S., 222, 225, 6 Sup. Ct. Rep., 33, 34, this court held that it would look at the evidence for the purpose of determining whether a motion for a judgment by one of the parties should have

been sustained. The court, speaking by Mr. Justice BLATCHFORD, saying:

> "This court cannot review the weight of evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered."

In the case of *Martin* v. *Hunter's Lessees*, 1 Wheaton, 304, there was in controversy the title to a certain tract of land. The case was brought to this court upon the ground that the construction of a treaty by the Court of Appeals of Virginia was involved. It was urged that this court could not inquire into the title, but could only determine the correctness of the construction put upon the treaty by said court, and that the judgment of said court would not be reviewed here, unless it appeared that a construction had been put upon the treaty. This court denied this position, on pages 357, 358, saying:

> "If this be the true construction of the section, it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction; and there are the strongest reasons against it, founded upon the words, as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against the title set up by the party. It is, therefore, the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what the title is, and whether it have a legal validity? *From the very necessity of the case there must be*

a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. If the court below should decide that the title was bad, and, therefore, not protected by the treaty, must not this court have a power to decide the title to be good, and, therefore, protected by the treaty? Is not the treaty, in both instances, equally construed, and the title of the party in reference to the treaty equally ascertained and decided? Nor does the clause relied on in the objection impugn this construction. It requires that the error upon which the Appellate Court is to decide shall appear on the face of the record, and immediately respect the questions before mentioned in the section. One of the questions is as to the construction of a treaty upon a title specially set up by a party, and every error that immediately respects that question must, of course, be within the cognizance of the court. *The title set up in this case is apparent upon the face of the record, and immediately respects the decision of that question any error, therefore, in respect to that title must be re-examinable, or the case could never be presented to the court."*

In *Cunningham* v. *Ashley*, 14 How., 377, an action was brought to this court on writ of error to the Supreme Court of Arkansas, the defendants claimed the legal title to the property in controversy, while the complainant claimed that he had a paramount equitable title thereto. This court examined all of the facts in the case with relation to their bearing upon the title of the parties, and at page 389, said:

"The facts in the case are exceedingly voluminous and complicated, but we have considered them, and the legal and equitable bearing they have upon the title of the parties. Upon this view, we are brought to the conclusion that the entries on which the defendants' patents were issued were void, so far as they interfere with the claim of the complainant, for the reasons stated, and that, consequently, the patents are also void."

The decree of the Supreme Court of Arkansas was reversed.

Hyde v. *Booraem,* 16 Peters, 169, was an action for the possession of notes, which had been executed and deposited for delivery to the plaintiff on certain conditions. The proceedings in the court below were in accordance with the practice of Louisiana, where the suit originated, and upon writ of error from this court all of the evidence was sent up with the record. This court there called attention to the fact that it was without authority to review the rulings upon questions of fact, but it did consider the evidence, the reason therefor being given by Justice STORY, on page 176, in these words:

> "Taking this case, then, as that was taken, to be one where there is no conflict of evidence, and all of the facts are admitted to stand on the record, without any controversy as to their force and bearing in the nature of a statement of facts, and looking to the allegations and prayer of the petition, and the facts stated by the judge, the question which we are to dispose of is whether, in point of law, upon these facts, the judgment can be maintained."

The court then reviewed the facts, and concluded that the judgment of the court below was wrong, and reversed it.

In *Dower* v. *Richards,* 151 U. S., 658, Justice GRAY, in an exhaustive opinion, says:

> "When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but the competency and legal effect of evidence as bearing upon a question of federal law, the decision may be reviewed by this court."

In the late case of *Pardee* v. *Aldridge, supra,* this court, considering a case in many respects similar to this one,

did consider the evidence; not for the purpose of reviewing any conclusions of the lower court on disputed questions of fact, for there were none, but, as said by Justice Story, *supra*, for the purpose of determining *"whether in point of law, upon these facts, the judgment can be maintained."*

In the case of *American Paper Bag Co.* v. *Van Nortwick*, 52 Fed., 752:

> "Upon the hearing in the court below, at the conclusion of plaintiff's case, no counter evidence being offered, defendants moved the court to strike out and exclude all evidence as not tending to sustain the issue on the part of the plaintiff. The court sustained the motion, to which ruling the defendant duly excepted." (P. 753.)

The Circuit Court of Appeals, in holding that it could review the evidence on page 753, says:

> "This ruling and exception authorize the review of the evidence so far as essential to the question whether the facts proven made a *prima facie* case, sufficient, in the absence of counter evidence, to justify a recovery by the plaintiff."
>
> *Goulding* v. *Hammond*, 54 Fed., 639.

The situation where defendant offers no evidence and where it does, but it raises no issue with that of the plaintiff, there is no conflict, are identical, and in each case the court will look at the evidence for the purpose indicated.

As it appears to us, as the Circuit determined that there was but a naked question of law presented, and this view was concurred in by the court from which this appeal is taken, the cause is before this court for the purpose of determining whether upon these undisputed facts the judgment can be sustained.

As is said by the Appellate Court of Indiana, in its decision of this case:

"An abstract question of law is therefore presented, as to whether or not the property in dispute passed by the foreclosure and sale."

C. I. & L. Ry. v. *McGuire et al.* (p. 250).

POINT V.

THE APPEAL IS PROPERLY PERFECTED FROM THE APPELLATE COURT.

As the Supreme Court of Indiana refused the petition of plaintiff in error to transfer this cause to it for revision and reversal of the decision of the Appellate Court, this appeal is properly here on writ of error to the said Appellate Court.

Missouri, etc., v. *Elliott*, 184 U. S., 530; 46 L. Ed., 673.

Rothschild v. *Knight*, 184 U. S., 334; 46 L. Ed., 573.

POINT VI.

THE MORTGAGOR COMPANY WAS BY STATUTE AUTHORIZED TO ACQUIRE REAL ESTATE IN CERTAIN CASES, WITHOUT REFERENCE TO THE USE FOR WHICH THE PROPERTY WAS DESIGNED BY THE COMPANY.

By Section 2 of an act in force January 20, 1852, passed by the General Assembly of Indiana, it was provided:

"It may be lawful for said corporations, by the consent of the directors of the same, to receive as subscriptions for the capital stock of said companies, under such regulations and restrictions as their board of directors may prescribe, any lands, town lots, real estate, or other description of property as may be offered for that purpose; provided, however, that the

same shall be sold (except so much as may be necessary for the use of said roads or for the purposes aforesaid) within a reasonable time, and the proceeds applied for the construction of said roads or their appurtenances." (Burns' R. S. 1901, Sec. 5151.)

By the second clause of Section 13 of an act of the General Assembly of Indiana, in force May 6, 1853, it is provided that such corporations are authorized—

> "To receive, hold and take such voluntary grants and donations of real estate and other personal property as shall be made to it to aid in the construction, maintenance, and accommodation of such railroad; but the real estate thus received by voluntary grants shall be held and used for the purposes of such grants only."
>
> 1 R. S. 1852, p. 425. Burns' R. S. 1901, Sec. 5153.

By the third clause of the last mentioned section such corporations are authorized to take and hold such lands "as may be necessary for the construction and maintenance of its railroad stations, depots and other accommodations necessary to accomplish the objects for which the corporation is created. * * *"

The property here in question, whether acquired or used for railway purposes or not, is property which falls within the designations which the legislature thus authorized the company to acquire under certain circumstances.

Inasmuch as each party to this litigation claims title to the real estate here in controversy through the mortgagor company, neither is in a position to contend that it was not acquired under authority given it so to do, by existing law.

It seems to us that the case of *Taber* v. *The Cincinnati,*

etc., Ry., 15 Ind., 459, ought to foreclose any discussion of this question. There a mortgage had been given on certain lands and town lots, which were not used or suitable to be used for the purposes of the road. The mortgagor company defaulted in the payment of certain interest, and an action was brought to foreclose the mortgage. It was contended that the complaint was insufficient for several reasons. Among others it was urged that the corporation had no power to acquire this property for the reason that it was not needed or used for the purposes of the road, and therefore the mortgage was of no effect.

In speaking of this contention and disposing of it, the court, on pages 463, 464 and 465, says:

> "Neither the original charter nor the amendment thereto contained any clause, in direct terms, conferring the right to acquire, hold, mortgage and dispose of real estate. It is contended by counsel for defendants that the company had the power to acquire such real estate as was essential to the operation of the road, but no more. *The description of the real estate contained in the record negatives the idea that it was for that purpose alone.* * * *
>
> "Before the bonds in suit were issued, another statute took effect (1 R. S., 426), by which railroad companies, which were then or might thereafter be incorporated, were empowered to receive lands, etc., in subscription of stock. The second section is as follows (then is set out in full Section 2 of the Act of 1852 above set out). * * *
>
> "*It is assumed in argument by defendant's counsel, although the record does not show it, that the lands mortgaged were acquired in payment for stock.* (P. 464.)
>
> * * * * *
>
> "We do not think the company, until the statute of 1852 was in force, had the power, primarily, to acquire title to the lands described; nor to any lands, other than for the immediate purposes of the road.

We suppose the defendants all stand in such condition that they are estopped to deny that the company did acquire title; it must, then, have been under the law of 1852."

Here the defendants in error, claiming the title of the mortgagor company, stands in the same position as it would if this action were directly against it, and not the pretended successor to its interest herein.

In the case of *American Dock, etc., Co.* v. *Trustees, etc.*, 39 N. J. Eq., 409, it was held that one who, himself, claimed under a grant from the state could not contend, in disputing the title of another, also under a like grant, that the state was without power to make the grant.

It is a principle to well settled for controversy that a mortgagor cannot deny its title to the mortgaged property, or its power to execute the mortgage.

American Water Works Co. v. *Farmers Loan etc., Co.*, 73 Fed., 956; 20 C. C. A., 133.

Vallejo Land Co. v. *Viera*, 48 Cal., 572.

Fisher v. *Milmine*, 94 Ill., 328.

First Natl. Bank v. *Ashmead*, 33 Fla., 416; 14 South., 886.

Burhans v. *Vanness*, 10 N. J. L., 102.

Boisclair v. *Jones*, 36 Ga., 499.

French v. *Blanchard*, 16 Ind., 143.

O'Hara v. *Shidler*, 26 Ind., 278.

Ryder v. *Sission*, 7 R. I., 341.

Hursey v. *Turbett*, 27 Pa. St., 418.

Stewart v. *Anderson*, 10 Ala., 504.

Myers v. *Snyder*, 96 Ia., 107; 64 N. W., 771.

Carson v. *Cochran*, 52 Minn., 67; 53 N. W., 1130.

So, too, the purchaser at an execution sale against a mortgagor is estopped to deny the title of the mortgagor or the validity of the mortgage.

In the case of *Wright* v. *Tichenor*, 104 Ind., 185, 188, it was held that a purchaser at an execution sale, could not deny the title of a part owner of such property, who was not affected by such sale, where the source of the title of such owner and the execution debtor was the same.

We take it to be established that the defendants in error are not in a position to deny that the mortgagor company lawfully acquired the real estate here in controversy. We also believe that they are not in a position to deny the validity of the mortgage, as against any property of the mortgagor, which it, in fact, covers.

In fact, the Appellate Court of Indiana, in its opinion in this case, held:

> "The property in question *was properly acquired* by the Louisville, New Albany & Chicago Railway Company." (Rec., p. 250.)

POINT VII.

THE MORTGAGOR COMPANY WAS AUTHORIZED BY EXPRESS ENACTMENT TO MORTGAGE THIS, AND ALL OF ITS PROPERTY, WHETHER USED FOR RAILWAY PURPOSES OR NOT, AND WHETHER OWNED AT THE DATE OF THE MORTGAGE OR AFTERWARDS ACQUIRED.

By Section 5212, Burns R. S. 1901, which became a law March 3, 1865 (Acts, 1865, p. 66), it is provided:

> "Said corporation shall have power to make and issue bonds bearing such rates of interest not exceeding seven per cent. per annum, payable at such times and places, and in such amount or amounts, as it may deem expedient; and to sell and dispose

> of said bonds at such prices and in such manner as it may deem proper, to secure the payment of any bonds which it may make, issue or assume, to pay by mortgage or mortgages, or deed or deeds of trust, of its railroad, or any part thereof, *and its real and personal property*, and franchises; and to act as a corporation. *All property of said corporation included in said mortgage* or mortgages, or deed or deeds of trust, *whether then held or thereafter acquired, shall be subject to the operation and lien* of such mortgage or mortgages, or deed or deeds of trust; *and in case of sale under the same, it shall pass to and become vested in the purchaser or purchasers thereof*, so as to enable them to form a corporation in the manner herein prescribed, and to vest in such corporation all the faculties, powers, authorities, immunities and franchises conferred by this act."

These provisions of the statute entered into and became a part of the three mortgages upon which plaintiff in error relies, and must be read with the descriptions of the property therein recited.

These statutory provisions divide the property the company is authorized to mortgage into two classes:

1. The *railroad*, which would include all property appertaining to the road, or used in connection therewith. It would include all appurtenances.

2. *Any of its other property*, real and personal.

Thus it is clear that there is an intention that the corporation may mortgage any property which it may acquire. The two classes mentioned in the statute are so comprehensive as to include all property of any nature which the company may acquire.

To this power to mortgage all of the different classes of the property of the corporation, is added a third power. That is to mortgage the said property "whether then held or thereafter acquired." The general power to mortgage

all property might have been limited by construction to mean that only then owned property should be mortgaged, but to avoid this result, the power to include after acquired property is explicitly given.

In the case of *Whitehead* v. *Vineyard*, 50 Mo., 30, that court, considering a statute much like ours, held that it was the clear intention of the legislature to include "all *other* after acquired property."

In the case of *Wilson* v. *Boyce*, 92 U. S., 325, 23 L. E4., 608, this court had to consider the extent of a lien which was made to cover the "road and property" of a railway company. There the State of Missouri had issued its bonds in aid of a certain road. There were two separate issues. In the act authorizing the first issue it was provided that they should be a lien on the "road and every part and section thereof, and its appurtenances."

In the second act, and upon the second issue, it was provided that the bonds "shall constitute a first lien and mortgage upon the *road and property* of the several companies," etc. Subsequent to the receipt of the bonds the company executed a deed of trust upon lands received by Act of Congress in aid of the road. The plaintiff claimed under this deed. On default the State of Missouri sold the property of the road, pursuant to power given in the above mentioned acts, and the defendant became the purchaser at such sale. The particular lands in dispute are thus described by this court:

> "*The lands in question do not constitute the road or any part thereof. The track of the road is not laid upon them, nor are they used in connection with the road.* The terms of the second mortgage are broader; and if the defendant's construction of its terms are correct, it is not necessary to decide whether the lands in question would pass under the expression 'appurtenances.'"

The court then discusses the sufficiency of the description, a subject to which we will hereafter have occasion to refer, and then, continuing, has this to say with reference to the scope of this authority:

> "In the first mortgage the state took its security upon the road and its appurtenances. In the second it authorized and obtained security not only upon the road of the company and every part thereof, but also upon its property, meaning its property and all of its other property. It is difficult to conceive any reason for this extension of language in the statute, except an intended extension of security."

It is thus held that this language in the statute was sufficient to include all property of the company, without reference to the uses or needs of the road.

It is clear that if the words "road and property" include power to mortgage all other property the words of our statute authorizing the mortgage to include "its railroad * * * and its real and personal property * * *," even with greater clearness gives such authority.

POINT VIII.

THE POINT URGED AGAINST THE TITLE OF THE PLAINTIFF IN ERROR AND WHICH HAS BEEN SUSTAINED BY THE CIRCUIT AND APPELLATE COURT, IS, THAT THE PROPERTY IS NOT INCLUDED IN THE DESCRIPTIONS IN EITHER OF THE MORTGAGES FORECLOSED, AND, THEREFORE, IT WAS NOT VESTED IN THE PLAINTIFF IN ERROR BY THE DECREE, SALE AND SUBSEQUENT DEEDS.

The learned judge of the federal court evidently thought that the description was sufficient to cover all of the property owned by the mortgagor, as the deed of the special master described all of it as being conveyed, and this deed was approved by the court.

The words of the mortgage of 1890 follow the words of our statute almost to the letter. In the conclusion of this mortgage it is said that it is the intention thereby to mortgage "all railroads, real and personal property * * * which the said railway company now owns, or at any time hereafter may own * * * *." The words of the statute are that the mortgage may cover "its railroad, or any part thereof, and its real and personal property. * * * All property of said corporation included in said mortgage, * * * whether then held or thereafter acquired shall be subject to the lien and operation of such mortgage * * *." Evidently the one who drew this mortgage had before him this statute, and intended to include therein the words of the legislature which gave authority to make it.

Considered in the light of this mortgage, and the proceedings had with reference to it, the question, as it seems to us, is not one of intention, but whether the words employed are sufficient to extend its binding force to the latitude intended.

The fact that the statute provides for a lien on all of the property, and specifically follows the lien through its different stages, finally lodging title in the purchaser at sale on decree, shows that the legislature intended to leave no room for doubt, nor to have its intent, in carrying full faith to such securities thwarted by any construction which the absence of these words would permit.

Without reference to the specific statutory authority concerning such mortgages, it has been uniformly held by the courts of Indiana, that a general description of property in a mortgage is all that is necessary. In the case of *Leslie* v. *Merrick*, 99 Ind., 180, a mortgage was given, which attempted to describe two different tracts of land.

As to the description of one of the tracts the Supreme Court, on pages 183-4, says:

> "This description of the sixty-one acres is obviously insufficient. But following it there occurs in the mortgage the following description of all the real estate mortgaged, and evidently intended to cure the imperfections in the previous descriptions: 'That *it is intended to mortgage all the land of John and Jane McKnight* except a * * * conveyed to Goodlet Morgan.' *A deed or mortgage of all the real estate of the grantor or mortgagor is good without any further description, because the real estate conveyed or mortgaged can be ascertained by evidence aliunde.*"

In *Barnes* v. *Bartlett*, 47 Ind., 99, 101, a grantor made a deed in which he described the property intended to be conveyed as "all right, title and interest, claim and demand, in and to all the estate, real and personal, * * * which it is or may be our right, to us, or either of us, to have, hold or receive as heir at law of Thomas Barnes."

This description was held to be sufficient to cover and convey all property inherited from such decedent.

In *Symmes* v. *Brown*, 13 Ind., 318, a deed describing real estate in a general, but in an indefinite way, but containing a general statement that grantors convey "all right, title, interest and claim in law or equity," by inheritance from a named decedent was held to be good.

In the case of *Woods* v. *Polhemus*, 8 Ind., 60, the deed described the real estate as "all their right, title and interest in the estate of Thomas Wood, deceased, wherever situate," was held to be good.

In *English* v. *Roche*, 6 Ind., 62, the court says: "The description is sufficient whenever the land intended to be mortgaged can be ascertained by it."

Referring particularly to railroad mortgages, we again

mention the case of *Wilson* v. *Boyce*, 23 U. S. L. Ed., 608 (2 Otto, 320).

There two mortgages were given by the Cairo and Fulton Railroad Company to the State of Missouri. The first mortgage covered the road and its "appurtenances"; just as does the clause upon which the court has based its decision in this case, cover only the road and its appurtenances of the New Albany Company.

The second mortgage covered the "road and property" of the company. The tract in controversy was a part of 11,896 acres of land which the company had owned. The plaintiff claimed title by deed from the company before foreclosure; the defendant claimed title through the foreclosure of the above mortgage and a sale of the property under such foreclosure.

In deciding the above case the court says:

> "The mortgage lien secured by the state by the act of 1855, when the first series of bonds was issued by the state, was expressed to be upon 'the road, every part and section thereof, and its appurtenances.' The lands in question do not constitute the road, or any part thereof. The track of the road is not laid upon them, nor are they used in connection with the road. The terms of the second mortgage are broader; and, if the defendant's construction of its terms are correct, it is not necessary to decide whether the lands in question would pass under the expression, 'appurtenances.'
>
> * * * These lands were the property of the company when held by it when this statutory mortgage took effect. The question is, does the word 'property' in the statute create a valid lien on these lands?
>
> The generality of its language forms no objection to the validity of the mortgage. A deed of 'all my estate' is sufficient. So a deed 'of all my lands wherever situated' is good to pass title. *Johnson* v. *De*

Lancy, 4 Cow., 427; *Pond* v. *Bery*, 10 Paige, 140. A mortgage 'of all my property,' like the one we are considering, is sufficient.

In the first mortgage the state took its security upon the road and its appurtenances. In its second mortgage, it authorized and obtained security not only upon the road of the company and every part thereof, but also upon its property, meaning its other property. It is difficult to conceive any reason for this extension of language in the statute except an intended extension of security."

"Such was the construction given to this language by the Supreme Court of the State of Missouri, in *Whitehead* v. *Vineyard*, 50 Mo., 30. The court there held that these words were intended to cover all the corporate property of the railroad company, including lands situated like those in controversy. It is said, however, that the language of the court referred to was obiter merely, and that the point before us did not actually arise in that case. This is an error. The action in that case was ejectment for land purchased by Thomas Allen, in a foreclosure proceeding of a statutory mortgage upon the lands of the Iron Mountain Railroad Company, under the statute of 1857, now before us. If the word 'property' did not cover the outside lands of the company, the plaintiff could not recover. But he did recover, the court saying that the intention of the legislature to include them was unequivocal; that there was not the shadow of a doubt upon the question. The point we are considering was the precise point before the court."

It was held that the mortgage lien attached, and the one claiming under it had title.

The mortgage there before the court is much like the one executed in 1890, now before this court. In the latter mortgage in the granting clause it is provided that it covered all the "railway system and property" in the future to be acquired; also in the concluding clause of the description, where it is described as "all railroads, real

and personal property" then owned, or thereafter acquired.

The distinction observed in the two mortgages executed to the state, and before the Supreme Court, illustrates the distinction between the other clauses in the mortgages in the case at bar, and those quoted by the Appellate Court, and considered by it in concluding that other property was not covered by these.

In the case of *Alabama* v. *Montague*, 117 U. S., 602, 6 Sup. Rep., 907, this court had to consider a mortgage which contained an "other property" clause. But there it was found in connection with the specific description, and neither in the granting clause or the conclusion. The court holds that it is clear that it was *not the intention* to cover and include all other property, but concedes the principle for which we are contending. On pages 912-913 it is said:

> "These words, which are found neither in the beginning of the granting clause as a general phrase to be afterwards emphasized by a more minute description, nor at the end, as a summary of what had preceded them, have their appropriate use in the place where they are found. * * *
>
> *It is not to be denied that in a writing descriptive of property to be transferred or assigned, the more general words, which include all that is intended to be conveyed, are not to be frittered away by an attempt at a description of each particular thing fairly included in the more general language.* But in such case it must be apparent that the intent was to include all that could be embraced within the more general terms. *If, for instance, the description of the property mortgaged had commenced by saying 'all the property of the grantor, real, personal and mixed, in the States of Alabama, Georgia, Mississippi and Tennessee, and had then attempted to enumerate this property, but have omitted some of it,*

this omitted part would have passed, as in *Spindle* v. *Shreve,* 111 U. S., 544."

The words of the mortgages before the court in this case are even more sweeping than those suggested by this learned court as being sufficient.

Here the description is not only contained in the granting clause, but also in the conclusion where the intent of the parties is expressly recorded. The words upon which the decision of the Indiana court is based are culled from the body of the specific description of the different properties owned by the mortgagor. The court in the case last cited holds that even if the specific description is not sufficient to include all of the property of the corporation, if it is clear from the granting clause, and, as it is in this case, also expressly declared to be the intent in the conclusion, "the more general words, which include all that is intended to be conveyed, are not to be frittered away by an attempt at a description of each particular thing."

In that case the court limited the words "other property" to mean property of a like character, for the sole reason that it was a part of the specific description, and not a part of the general declaration of intention in the granting clause.

This court also places itself on record with the proposition that even if the particular description does not include all property, if the declaration of intent does, it will supply any omissions which would result from adopting the specific description.

Applying this to the case at bar, where, especially in the mortgage of 1890, it clearly appears that it was the intention to embrace all property, and such intent is declared in so many words, even if the words relating to after-acquired property contained in the specific descrip-

tion do not cover this property, these words are not to be adopted to the exclusion of the other, but the general words supply any omissions in the particular description, and give the security the latitude intended by the parties.

In the case of *Cooper* v. *Wolfe*, 15 Oh. St., 523, the mortgage and the statutory power were much like those in the case at bar. The property there in controversy was some old railroad iron, such as broken wheels, rails, ties and other scrap and refuse iron which had ceased to be of any value for any purposes except for sale.

On page 530, the court says:

> "Counsel for the plaintiffs contend that whenever an article is detached, and its place supplied by a new article, the old becomes liable to execution, because, they say, it has ceased to be a part of the thing mortgaged. * * * And such might be the law of these mortgages, were they—as in the case cited from New York by counsel—(25 Barb. S. C. R., 284), *mortgages upon the 'railroad' eo nomine, and upon its real estate merely*. But such is not the character of the mortgages in question. They pledge, not only the road and real estate, but also the 'engines, tenders, cars, tools, materials, machinery, *and all other personal property*,' and the laws under which they are made authorize the company thus to pledge, not only the road and real estate, but also their 'equipment, franchises, income and resources,' and make such mortgages a lien upon *all the 'personal property'* of the company. The language of the laws authorizing the mortgages, as well as that employed in them, is very broad and comprehensive, and we have no doubt was intended, and has the legal effect to include the description of property specified in the charge of the court."

It is thus held that where the statutory power to mortgage includes a power to mortgage "all other personal property," and the power is exercised in the language of

the statute, the mortgage lien attaches and continues without reference to the use in which the property is employed.

In the case of *Central Trust Company* v. *Kneeland*, 138 U. S., 414, 34 L. Ed., 1014, 1015, the court, in speaking of the limit to which after acquired property clauses may go, says:

> "The first mortgage had the 'after acquired property' clause in it. It is settled that such a clause is valid, and that thereby the mortgage covers not only property then owned by the railroad company, *but becomes a lien upon all property subsequently acquired by it which comes within the description in the mortgage.*"

Short, in his excellent work on Railway Bonds, in speaking of general descriptions in railway mortgages, Section 197, says:

> *"The entire property will pass by an appropriate generic description in the mortgage."* * * * "The general rule is, that, as already stated, the fact of present ownership sufficiently identifies the property to admit of its being conveyed by the most general words, if such appears to be the intent of the grantor. *Whether the property is necessary to the enjoyment of the franchises is entirely beside the question. The duty of the court is confined to ascertaining the true construction of the instrument without regard to any extraneous considerations. Thus, where the granting clause covers 'all and singular the lands, etc., rights and interests, real estate, etc.,' all the lands belonging to the company will pass without regard to the purpose for which they may be used.*"

In the case of *Robinson* v. *Railway*, 66 Pa. St., 160, the exact question which we are here considering was before the court. In deciding it, among other things, the court says:

> "The property being owned by the company at

the time of the execution of the mortgage, it clearly passed under the terms, 'all and singular, the estate and property, real, personal and mixed,' of the company, and the words, 'together with all and singular the lands, etc., rights and interests, real estate, etc., of and belonging to said party of the first part, of every kind, nature and character in either the states of New York, Pennsylvania and Ohio.' *The company having power to mortgage all its property, real and personal, and the instrument having embraced everything of a real and personal nature, it becomes immaterial whether the property in question was necessary to the use or enjoyment of the railroad or not.*"

In *Seigfried* v. *Peoples Bank*, 2 Tenn. Ch., 17, the description in the trust deed was, "All lands, tenements, etc., of every nature and description belonging to" the grantor bank, was held sufficient to pass all the bank's realty.

The chancellor, in speaking of the description, said:

> "Such a description has already been held good in wills. * * * In *McGovorock* v. *Deery*, Cold., 265, the conveyance in a deed of trust to the creditors of the grantors the 'undivided interest in the real estate of his father, wherever situate,' was held good. A deed of all her, the grantor's, lands and tenements, was held by Chancellor Wilhelm to carry the grantor's interest to any real estate to which she was then entitled. *Pound* v. *Barr*, 10 Paige, 146, and a deed conveying 'all my estate,' or all the estate of which a third person died seized, is equally effective."

To the same effect are:

Tranum v. *Wilkinson*, 81 Ala., 408; 1 South., 201.

Jackson v. *DeLancey*, 11 Johns., 365; 7 Dec., 403.

Frink v. *Branch*, 16 Conn., 260.

Strouse v. *Cohen*, 113 N. C., 349; 18 S. E., 323.

Thomson v. *Madison Assn.*, 103 Ind., 279.

Brown v. *Maury*, 85 Tenn., 358; 3 S. W., 175.

Starling v. *Blair*, 7 Kentucky (4 Bibb.), 288.

Westmoreland v. *Carson*, 76 Tex., 619; 13 S. W., 559.

Bank v. *Barrow*, 21 La. Ann., 396.

Eggleston v. *Watson*, 53 Miss., 339.

Beach on Railways, Section 616, in speaking of descriptions in such mortgages, says:

> "*The question as to what property is covered by a mortgage is entirely one of construction, dependent upon the authority under which the mortgage was made, and the intention of the parties as gathered from the language used, the same rules being applicable as control the construction of deed made by individuals.* It is evident that, when the mortgaged property is specifically described, there can be but little room for controversy; for a description or enumeration of certain things, real or personal, as subject to the mortgage, is exclusive of all others. But when such general terms as 'all other property,' 'the undertaking,' and 'appurtenances,' have been employed, there has been no little litigation over the intention of the parties. *A mortoage of railway property is to be construed in connection with the statute by which its execution is authorized, and when the statute confers upon the company the power to mortgage the whole, a deed couched in general terms will be deemed to create a lien upon all of the corporate property, unless a contrary intention appear in the instrument itself;* and, on the other hand, mere general words of description are not to be construed as extending the lien beyond the subject-matter as defined by the enabling act. The franchise of being a corporation is not included in a mortgage of the property and franchise of a railroad, unless by positive provision of law."

In the case of *Brady* v. *Johnson,* 26 Atl. Rep., 49 (Md.), a canal company gave a mortgage to the State of Maryland on "all and singular the lands and tenements now owned, or that may hereafter be acquired, by the said company, and all interest that said company now has or may hereafter have in or to any lands and tenements, estates and securities."

Speaking of this mortgage, the court, on page 51, says:

> "It thus appears that by these statutes and the mortgages, executed as thereby required, all property, of every kind and description, then owned, or that might be thereafter acquired, by the company, was, and still is, pledged and bound for the debts due the state."

Continuing, on page 52, the court says:

> "* * * It is now well settled that a mortgage with the 'after-acquired property' clause in it, embraces and creates a charge upon all property subsequently acquired by the corporation mortgagor, which comes within the description in the mortgage, and this is not only as to property to which the mortgagor acquires the legal title, but also as to that to which it only acquires an equitable title."

It was there held that two tracts of land thereafter acquired were covered by it.

In the case of *Williamson* v. *Railway,* 36 N. J., 398, it was held:

That a corporation was authorized to execute a mortgage covering all real and personal property then held, or thereafter acquired.

After the execution of the mortgage then before the court the mortgagor company acquired control of the capital stock of another company. It was held that this stock was subject to the lien of the mortgage, the court, among other things, saying:

> "The mortgagor had the right and possessed the power to acquire the stock in question. * * * The mortgaging of personal property thereafter to be acquired was the legitimate exercise of the power to mortgage personal property."

Under a Louisiana statute authorizing, as does the Indiana statute above quoted, a railway company to mortgage its present and prospective property, the court held in *Bell* v. *Ry. Company*, 34 La. Ann., 785, that the mortgage attaches to property as effectually as if it had been described specifically in the act, it being entitled to the same effect as if it had been a judicial mortgage."

In *Parker* v. *Railway Company*, 33 Fed. Rep., 696, the court approved this construction of the Louisiana act, and the power it vested in the company, and continuing said:

> "Obviously, it would be difficult, if not impracticable, for a railway company to specifically describe future property that may be acquired by grant or otherwise, and the generality of the language used in the mortgage act should not be fatal objection to the legal efficacy of the act relied on by complainants."

If this authority to mortgage other "real or personal property," "whether then held or thereafter acquired," is to be given effect, the contention that after-acquired property not acquired for railway purposes, cannot be mortgaged by generic description, cannot prevail. It is needless to urge that it would be utterly impossible to describe such future acquired property in any other way. Just where it may be along a line of railway, and just what it may consist of cannot be known when the mortgage is given. These mortgages secure bonds running for a long time. The court knows, as a matter of history, that these securities run from twenty to fifty years, and therefore

with this class, less than any other, could a requirement of a more specific description be complied with. From the very fact that the legislature conferred the power to mortgage property thus to be acquired, it follows that it was intended that the power should be exercised in the manner which human agencies permit. To hold that a specific description of this "other property" is essential to the validity of such a mortgage, is, in effect, a denial of the power to mortgage.

It is clear that if this property was held when the mortgages, or either of them, were executed, it is sufficiently covered by the clause referring to "then owned" property. How much more reasonable is it to hold such a description to be sufficient with reference to after-acquired property. Property then owned may be specifically described, for its identification is known. But in the very nature of things this cannot be true of property to be acquired. As the power to mortgage any property thereafter acquired, whether used for railway purposes or not, must be conceded, it must follow, that if this power is exercised with the same degree of certainty as is required with property, the identification of which is known, it is sufficiently exercised.

POINT IX.

THE LEARNED COURT OF INDIANA DID NOT CONSIDER ALL OF THE PROVISIONS OF THE MORTGAGE, BUT ONLY A SINGLE PARAGRAPH WHICH IS FOUND IN THE SPECIFIC DESCRIPTION OF PROPERTY, AND WHICH IS NOT AS BROAD AS THE DECLARATION OF INTENTION AT THE BEGINNING AND CONCLUSION OF EACH MORTGAGE. THEN, TOO, EVERY AUTHORITY CITED BY THE COURT IN SUPPORT OF ITS OPINION IS BASED UPON A MORTGAGE WHICH, BY ITS EXPRESS TERMS, OR BY THE STATUTE AUTHORIZING IT, LIMITED THE LIEN TO PROPERTY ACQUIRED FOR RAILWAY PURPOSES.

The learned Judge, speaking for the Appellate Court of Indiana, says:

> "In the mortgage of 1886 the description of after acquired property is as follows: 'Which may at any time hereafter during the continuance of this trust be acquired by said railroad company for purposes connected with or appertaining to the railroads or railways above mentioned.'
>
> "The description of after acquired property in the mortgage executed in 1890 was in the following words: 'And all that it may in the future add, construct or acquire for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described.'
>
> "The description of after acquired property in the mortgage executed in 1894 was in the following words: 'What may at any time before or after the date of this indenture be acquired by or for the railway company for purposes connected with or appertaining to said railroad or railways hereby conveyed." (Rec., p. 251.)

In our statement of the record we have shown the introductory and concluding provisions of the descriptions

of property intended to be covered thereby. The general declaration at the beginning of the description in the mortgage of 1890 says in so many words that it shall cover "all of the personal and in the future to be acquired railway system and property * * * of every kind and nature, and however owned." Then follows a long statement of the items mortgaged. It is in the body of this attempted specific description that is found the above clause with reference to future acquired property considered by the learned Judge of the Appellate Court. At the conclusion of this description it is said in so many words: "It being intended and hereby expressly covenanted, that the lien of this indenture shall embrace and bind all railroads, real and personal property * * * which the said railway company now owns, or at any time hereafter may own, as fully, etc. * * *"

In the case of *New Orleans, etc.*, v. *Parker*, 143 U. S., 42; 12 Sup. Rep., 364, cited by the Appellate Court, the act under which the mortgagor company was incorporated, and giving it power to execute mortgages, restricted the lien of such mortgages to real and personal estate *"appurtenant to or necessary for the operation of said main line of railroad."* And the mortgage then before the court provided that it should cover *"all other property*, real and personal, of every kind and description whatsoever, and wherever situated in the State of Louisiana, which is now owned, or which shall be hereafter acquired, by said company, and which shall be *appurtenant to, or necessary to be used for the operation of said main line of railroad, or any of its branches."*

The court, on page 367, in construing the mortgage and power, says:

> "The language of the act of the legislature and the mortgage itself restricts its lien to real and per-

> sonal property situated in the State of Louisiana, then owned or which should be thereafter acquired, and which should be appurtenant to, or necessary or used for the operation of the main line of said road or any of its branches. * * * No argument is needed to show that a land grant is not necessary to aid in the construction of the road, but it is certainly not necessary in its operation. Plaintiff's contention, then, if supportable at all, must be upon the theory that the land grant was appurtenant to the road; not necessary to its operation, but to the road itself."

In that case the lands in controversy were lands granted by congress in aid of the construction of the road. It was held, and properly so, that these lands, after acquired, did not pass, under the after-acquired clause of the mortgage, because they were not appurtenant, and the company was not authorized by its charter to mortgage any but "appurtenant" lands; and in the particular mortgage, before the court, had not attempted to do so.

In the case of *Humphreys* v. *McKissick*, 140 U. S., 304; 11 Sup. Rep., 779, cited by the Appellate Court, there was in controversy some elevator stock which the Wabash Company acquired after the execution of the mortgage in an elevator beyond the terminus of its road. The only clause in the mortgage which it was claimed included the stock, is in the words *"and other appurtenances thereunto belonging."*

On page 782, the court says:

> "From the views expressed we are of the opinion that the stock held by the Wabash in the Union Elevator Company at Council Bluffs was not covered by the mortgage executed on February 15, 1879, such stock not being in any sense an appurtenant to the property covered by the mortgage."

The mortgage in the case of *Railroad* v. *Coffin,* 50 Conn., 150, provided that its lien should extend to lands *"acquired by the company for the purposes of the railroad."* In holding that this clause did not extend to disconnected lands, not adopted to the uses of the company, the court, among other things, said:

> "Lands purchased and sold at a profit, although the profit might be expended in the construction of the road, were never intended to be embraced by the phrase, 'acquired by the company for the purposes of the road.'"

In the case of *Walsh* v. *Barton,* 24 Oh. St., 28, the lands in question were not used for the purpose of the road, nor adopted for such use. The mortgage provided that it should cover "all property, real and personal, of said party of the first part, whether now owned or hereafter acquired, *used or appropriated for the operating or maintaining the said road."*

On page 43, the court says:

> "The testimony shows that the railroad was not located on the lands embraced in the purchase of the defendant below, nor were the lots purchased by him ever used for railroad purposes. The question, then, is this: Was the entire tract of land embraced in the mortgages? We think not. The words 'used or appropriated for the operating or maintaining the said road,' restrict the operation of the mortgages to such property, real or personal, of the company, as then was, or thereafter might be used or appropriated for operating the road."

In the case of *Mississippi, etc., Co.* v. *Chicago, etc., Co.,* 58 Miss., 896, a railroad mortgage covering property thereafter to be acquired was confined to such as was appurtenant to or necessary for building or operating the road, and carrying out the purposes for which it was created, and was held not to include an hotel and brick

storehouse, some vacant town lots and a farm of 300 acres; the hotel being used as a railroad eating house, and the other property being rented out for the several purposes for which it was adopted.

There was no statute authorizing the company to acquire the property in controversy; and there was no statutory power to mortgage "other property" thereafter acquired. A statutory authority to mortgage property owned at the time of the execution of the mortgage, is extended by implication to include power to mortgage after-acquired property, acquired for railway purposes; but not property not acquired for such purpose.

As our statute expressly authorizes all after-acquired property to be mortgaged, this case is not an authority here.

In the case of *Dismore* v. *Racine, etc., R. Co.,* 12 Wis., 725, cited by the Appellate Court, it was held that a mortgage by a railroad company of its road and appurtenances, and of lands after acquired for its stations, shops and the like uses, does not create any lien upon a tract of woodland afterwards acquired, situate several miles from its road. This decision is placed upon the distinct ground that the words of the mortgage were not broad enough to cover the property in controversy. In course of the opinion the court says:

> "The lands and real estate spoken of in the mortgage, were those upon which the road was to be constructed, or in which the company might acquire the right of way, or lots or parcels of land along the line of the road, used or to be used for erecting thereon depots, engine houses, shops, and all such structures as might be necessary for the business and operation of the road; or upon which drains and embankments

might be made for the protection and preservation of the same."

In the case of *Farmers Loan and Trust Co.* v. *Bank*, 11 Wis., 207, it was held that a mortgage by a railway upon its stock, materials and every kind of personal property, did not profess to cover chairs acquired by the company which were never used in connection with its business.

In that case the mortgage covered the "railroad, with its superstructure, track and all other appurtenances made or to be made," and also the "railroad furniture, including engines, tenders, cars of every description, tools, materials, machinery, *and every other kind of personal property which shall be* USED FOR OPERATING *said railroad.*"

In *Shirley* v. *Waco Ry. Co.*, 78 Tex., 131; 10 S. W., 543, the mortgage covered "all and singular the charter rights, privileges and franchises" granted by the legislature, "and all other rights and appurtenances."

It was there held that lands donated by the state were not *appurtenances*, and did not pass on foreclosure.

In *Eldridge* v. *Smith*, 34 Vt., 484, the mortgage lien by the express terms of the instrument was limited to the "railroad and franchise, and also all station house, engine houses, etc., and other appendages with *all the lands thereto belonging and intended for the use and accommodation of said road.*"

In the case of *Shamokin Valley* v. *Livermore*, 47 Pa. St., 465, the lien of the mortgage was limited to the entire road with its "corporate privileges and appurtenances."

The lands in question were not appurtenances, and the mortgage did not even purport to include them.

The Appellate Court quotes as authority supporting its conclusion the last clause of a paragraph found in the work of Mr. Short on the law of railway bonds and mortgages, Section 209. The part quoted conveys the idea that the lien of railway mortgages as to after-acquired property, is limited to such as is acquired for railway purposes. But considering the entire paragraph, it appears that the author there refers to mortgages where there were restrictive words limiting the lien to such property.

The entire paragraph from which this clause is taken by the court is as follows:

> "Similarly, where the general words of the description are qualified by such phrases as 'that may be included in the location of said railroad,' 'used as a part of said railroad,' 'appurtenant thereto,' 'necessary for the construction, operation or security thereof,' 'necessary for the completion and operation of the road'—the lien will be confined to the lands which were prospectively necessary and convenient for the construction and future operation of the road, and will not embrace lands situated outside the lay-out of the road, which had been taken over by the company in order to acquire at a less cost the lands actually needed for the lien itself."

From the very fact that the author places his conclusion upon the *limiting words* of such mortgages, it is clear that he intends to recognize the right to mortgage all property by the use of *proper words*.

This leaves yet unconsidered the case of *Seymour* v. *Railway*, 25 Barb., 284. In that case the words of the mortgage, with reference to after-acquired property, were general. But the charter limited the right of the corporation to acquire real estate, and the court held that the after-acquired clause should only extend to such property

as the corporation was by its charter authorized to acquire.

On page 311 the court says:

> "But the equitable rights of the plaintiffs only extend to the particular land designated by statute, and which the company was authorized to take, and did take, for the use of its road."

On page 307, in speaking of the proper construction of the mortgage, the court says:

> "The description in the mortgage, of the land acquired, and to be acquired, must be deemed to refer to the charter, and the law defines the land which the mortgage is destined to cover, and the lien of the mortgage clearly attached to such unacquired land so soon as the title thereto passed to the corporation."

Continuing, on page 311 the court says:

> "But the equitable rights of the plaintiffs only extend to the particular lands designated by statute. * * * The railroad company, in addition to the right to lay out its road not exceeding the width of six rods * * * was entitled * * * 'to purchase, hold and use all such real estate, and other property as may be necessary * * * to accomplish the objects of its incorporation.' * * * , all such lands, with the erections thereon, would pass to the complainants, under their mortgage, as part of the railroad, or as essential to its use and enjoyment.
>
> But lands acquired by the railroad company, and not thus used or employed for railroad purposes, would not come within the description of the mortgage.
>
> The particular lands which were to be acquired after the mortgage was put on record in the several counties through which the railroad passed, within the rule above stated, must necessarily be the lands designated by the statute for the railroad, and such as the company was authorized to acquire and take

for its track and legitimate use, as above stated. These are embraced within the purview of the mortgage and nothing more."

While the court seems to regard this authority as in point, yet it appears that it was because of the limit of the power to mortgage after-acquired property and the power to acquire real estate, that it was held that only such property as was acquired for railway purposes was within the purview of the mortgages.

That this is not an authority in Indiana, we believe is established by the case of *Taber* v. *Railway*, 15 Ind., 459, to which we have already referred at length.

It is interesting to note that counsel for the appellant in the case last cited, cited the case of *Seymour* v. *Railway, supra*, as an authority supporting their contention.

Here, as there, it was not shown why this property was acquired, nor how it was acquired. Whether it was received in payment for stock as a donation or for what purpose. It is clear, however, that the company was authorized to receive this property, and that all of the parties to this action are in a position where they are affirming its title, and, therefore, are estopped to deny the authority of the corporation to acquire and hold it.

Then, it is to be remembered that where a corporation has power to do a thing upon the existence of certain conditions, the validity of its act will be presumed and the one who asserts its invalidity has the burden of showing the non-existence of such conditions.

Railway v. *Mahoney*, 148 Ind., 196, 203.
Russell v. *Railway*, 157 Ind., 305, 315.
Smith v. *Board*, 6 Ind. App., 153, 165.

We believe we have made it clear that neither of the mortgages in controversy in the cases which the Appellate Court cites in support of its opinion are similar to those upon which appellant's title is based, and that in each case it was held that only railway property was covered because of the *words of limitation* in the respective mortgages, or in the charter powers of the corporation.

POINT X.

TITLE WAS SUFFICIENTLY SHOWN BY PROOF OF A VALID ORDER OF SALE AND A DEED.

Indianapolis, etc., v. *Center Tp.*, 143 Ind., 63, 69.

Wollen v. *Rockafeller*, 81 Ind., 208.

POINT XI.

THE COURT ERRED IN REFUSING TO ADMIT OFFERED EVIDENCE, WHICH WOULD HAVE SHOWN THAT THE PROPERTY WAS ACQUIRED BEFORE THE DATE OF EITHER MORTGAGE, AND, THEREFORE, THE LIEN ATTACHED UNDER THE CLAUSE COVERING ALL PROPERTY "THEN OWNED."

All that we have thus far said is upon the assumption that the power to mortgage property after acquired is just as broad as that to mortgage property owned at the date of the mortgage, and that when a mortgage is executed from which it appears that there is a clear intention that the lien shall attach to all future acquired property, the reason for acquiring the property is of no consequence.

If we are in error as to this; if, perchance, there is

some virtue in such a mortgage on property then owned, which does not attend one which is aimed at after acquired property, then the Circuit Court erred in refusing to admit evidence offered for the purpose of showing that the railway company owned this property at the date of each of these mortgages. The statute gives the power, and this court in the case of *Wilson* v. *Boyce*, and the Supreme Court of Indiana, in the case of *Leslie* v. *Merrick*, *supra*, have affirmed the proposition that a description of "all property" owned by the mortgagor at the date of the mortgage was a sufficient one. Many of the cases to which we have referred sustain this position.

If this be true, and there was legitimate evidence offered for the purpose of showing that this property was acquired much earlier, due effect was denied the decree by a refusal to admit the evidence.

The Plat Excluded.

The appellant offered in evidence a certified copy of a plat of the town of Francesville, upon which the ground here in question was indicated as being "depot grounds."

The party who signed this plat, above his signature, among other things put the following: "The depot being built immediately on the section line, divided said section line." This plat is dated March 3, 1862, and recorded April 8, 1862. (Pp. 12a and 38a.)

Counsel objected to the introduction of the plat for three reasons:

1. That it had not been shown that the man who signed this plat was the owner of the property included in it.

2. That it was void because it named no grantee with reference to the tract designated as depot grounds.

3. Because it contained no description of the property. (Rec., 39.)

Answering these objections in their order:

It was not necessary for the plaintiff to show that the person who platted these lands was in fact the owner thereof at the time such plat was made.

This objection is fully met by Section 4238a, R. S., 1901, which is an act by the general assembly of Indiana, legalizing all plats of additions to cities and towns and of subdivisions of sections. This section, if it is valid for any purpose, is sufficient to overcome the objection of counsel that it was not shown that the owner of this property had signed the plat.

This section reads as follows:

> "That all plats of additions to cities and towns and of subdivisions of sections which have heretofore been recorded in the recorder's office of any county without the owner or owners thereof having signed the same, or without having the execution thereof acknowledged and certified as required by law, but under which lands or lots have been sold or conveyed, or where such additions or subdivisions have been entered upon the tax duplicate for the purposes of taxation in accordance with the descriptions contained in such plats, are hereby legalized and declared valid to all intents and purposes from the date of the recording of such plats, to the same extent as if the same had been duly signed and the execution thereof had been duly acknowledged and certified before they were recorded."

Another plat of the town which was admitted in evidence, and admitted to be correct, shows this ground as platted at the present time in identically the same way as it was platted by Allison, and thus shows that the Allison

plat is the one which is recorded as the true plat of the Town of Francesville. This plat is found in the record, page 240a. This property has also been entered on the tax duplicate by the description in this plat. (Pp. 158 to 163.) All of the descriptions in appellee's proceedings and deed are based upon this plat. (Pp. 196 to 209.)

It is important to note that the act legalizing this plat was in force before the lien of appellee McGuire attached to any property of the New Albany Company. But even if this were not the case, he would not be in a position to deny the validity of this act.

As for the description being void, we think that there is no force in this objection. All of the different streets are indicated, the location of the railway is indicated, and there would be no trouble whatever in locating this tract of ground with the monuments thus established. This plat was valid, and sufficient to transfer the legal title to the property in question to the railway company then owning the line of track indicated on the plat.

We also think the grantee was sufficiently indicated on the plat.

In the case of *Morgan* v. *The Chicago & Alton* (U. S.), 24 L. Ed., 743, the Supreme Court had to consider a plat in this respect similar to this one. There the owner of the real estate had conveyed one hundred feet to the railway for a right of way. He afterwards platted the ground on each side of the railway track and left a strip 200 feet in width and 1,004 feet long, and on the plat marked it "depot ground." No railway was named, and it was afterwards contended that the extra fifty feet on each side of the center of the track thus attempted

to be dedicated was not dedicated, because the plat was indefinite, uncertain and void.

The Supreme Court, on pages 745 and 746, held against this contention, and in so doing said:

> "It is also insisted, in behalf of the appellee, that the premises in question were dedicated by the appellant to the railroad company. This question arises under the 21st section of Chapter 25 of the Revised Statutes of Illinois of 1845. The provisions of the statute are peculiar. It declares, touching town plats, that the plat or map, when executed and recorded as required, 'And every donation or grant to the public, or any individual or individuals, religious society or societies, or to any corporation or bodies politic, marked or noted on such plat or map,' shall be deemed a sufficient conveyance of such parcels of land to vest a fee simple title, and shall be considered a general warranty against the donor and his heirs to the grantee, for his benefit, 'for the uses and purposes therein named, expressed or intended, and for no other use or purpose whatever.' Four classes of parties are named who may be the recipients of the donation: (1) The public; (2) any individuals; (3) any religious societies; (4) any corporations or bodies politic. The purposes of the grant are not required to be set forth, nor is there any limitation as to what they shall be. The power and will of the donor are unfettered. The provisions are simply a mode of conveyance which the grantor may pursue, if he chooses to do so. The language of the statute is clear and explicit. There is no room for doubt. The case is one in which the rule applies, that there shall be no construction where there is nothing to construe. Dwarris Statutes, pp. 143, 144. There can be no doubt of the power of the legislature so to provide.
>
> Was the intention of the appellant to dedicate the premises to the railroad company for its use for depot purposes, as claimed, 'named, expressed or intended'? Either, as to the use, is, according to the statute, sufficient.

The facts to which we have adverted in the previous parts of this opinion seem to us conclusive upon the subject. The question must be resolved in the affirmative. If this view be correct, the legal title, by virtue of the statute, passed to the corporation with the right of user as to the premises for all depot purposes, but for none other.

No particular form of words is required to the validity of a dedication. The dedication may be made by a survey and plat alone, without any declaration, either oral or on the plat, that it was the intention of the proprietor to set apart certain grounds for the use of the public. An examination of the cases referred to on the argument will show that dedications have been established in every conceivable way by which the intention of the dedicator could be evinced. *Godfrey* v. *Alton*, 12 Ill., 29.

The question whether a person intends to make a dedication of ground to the public for a street or other purpose must be determined from his acts, and statements explanatory thereof, in connection with all the circumstances which surround and throw light upon the subject, and not from what he may subsequently testify as to his real intent in relation to the matter. *Columbus* v. *Dahn*, 36 Ind., 330.

All that is required is the assent of the owner, and the use of the premises for the purposes intended by the appropriation. The law considers the owner's acts and declarations as in the nature of an estoppel *in pais* and precludes him from revoking the dedication. *Cincinnati* v. *White*, 6 Pet., 431; *Holdane* v. *Cold Spring*, 21 N. Y., 474."

This case is as nearly in point as one could well be. The words used in designating the ground on the map are the identical ones here employed, and here we have the additional fact in the indication of the depot, the water tank, and the wood-house, on this tract which we claim was dedicated to the company. True, the Illinois case from which we have quoted was based upon a statute with reference to dedicating property to private persons,

but this statute is substantially the same as the one in force in Indiana, and which was in force when this plat was made.

We refer to Section 4412, R. S., 1901, which reads as follows:

> "Every donation or grant to the public, or to any individual, religious society, corporation or body politic, noted as such on the plat of the town wherein such donation or grant may have been made, should be considerd a general warranty to the said donee or grantee for the purposes intended by the donor or grantor."

In the case decided by the United States courts the fact that the railroad company had been in possession, and such possession had been undisturbed for many years, was cited as an additional circumstance showing concurrence by the grantor. There is not the slightest indication that the owner ever protested against this occupancy, but it is shown that the adjoining lots were sold, buildings have been erected upon them, and this has at all times been recognized as railway property, which the grantor intended that it should be.

Every presumption is in favor of the decree of the United States court. Here all of the property of the mortgagor company was ordered to be sold, and a deed conveying all property of the mortgagor company was approved by the court, as a proper execution of its decree of sale. In view of this, the presumption is that such conditions as were necessary to exist in order for that court to order the sale of the whole proprety did exist, and the defendants in error, denying this, have the burden of proving that this is not true. If, as defendants here contend, if this property was after acquired it was not covered by the decree, it is for them

to show when it was acquired, and, failing in this, full effect will be given to the decree.

In *Knevals* v. *Railway*, 66 Fed. Rep., 229, the court had to consider this question. In deciding it the court says:

> "It has been established by both parties that the question as to whether these lots in question appertain to the railroad, and therefore pass by the sale, is the important one in this case. Our views do not coincide with those of the complainant that the burden of proof upon this point is upon the defendant to show that the property passed by the sale, but, the sale being proven, and being general, purporting to convey all the property, rights and franchises of the railroad, and possession having passed with the sale, and the property being now, and having been for years, in the control of the defendants, and a great part of each lot occupied for railroad purposes, we consider the burden to be upon the complainant to show that it came within some exception and did not pass."

The plaintiff in error offered to prove payment of town taxes by it on the property in controversy for the year 1891, and all subsequent years to 1898 by the mortgagor company; also a special assessment for a local improvement of $1,600. (Petrie Rec., 170 to 174.) This evidence was all excluded.

It was shown that one Brooks made a deed to the mortgagor company for the property here in dispute, in 1896. In that deed the original plat or dedication thereby of this property is confirmed. It was also shown that this property was listed for state and county taxes, by the descriptions given it in the excluded plat, and that from 1889 to 1898 the mortgagor was taxed of record therewith, and paid such taxes. (Pp. 157 to 169.)

It was also shown that the depot and stock pens were

constructed on this track before 1865, and that they have been maintained there ever since. (Pp. 174 and 178.) That in 1893 the mortgagor company leased a part of this property, and in 1897 the plaintiff in error leased a part of it. (Pp. 242 and 245.)

The plaintiff in error also offered the excluded plat, in connection with the Brooks deed, but it was again excluded. (P. 180.)

With the excluded evidence admitted, dedication and acceptance from the date of the plat would have been established. Indeed, with its continued possession, payment of taxes and assessments, and exercise of acts of ownership, the dedication in the plat would have the full force and effect of a deed of conveyance.

With this evidence, title at the date of each of the several mortgages would have been established, and with that, the mortgages would each have included the property, under the provision covering all of the property of the mortgagor owned at the date thereof.

POINT XII.

THE JUDGMENT OF THE CIRCUIT, APPELLATE AND SUPREME COURTS OF INDIANA DENYING THE TITLE OF PLAINTIFF IN ERROR TO THE REAL ESTATE IN CONTROVERSY, SHOULD BE IN ALL THINGS REVERSED.

Respectfully submitted.

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